

1 Anna Zbitnoff
2 P.O. Box 832
Redwood Valley, California 95470
Telephone: 707-489-0201
3 Email: azbitnoff@comcast.net

4 Plaintiff, In Pro Se

5

6

7 **UNITED STATES DISTRICT COURT**

8

9 **NORTHERN DISTRICT OF CALIFORNIA**

10 ANNA ZBITNOFF,) Case No.: 3:13-cv-05221-WHA
11)
12 Plaintiff,) **PLAINTIFF'S REPLY IN SUPPORT OF**
13) **PLAINTIFF'S MOTION FOR LEAVE TO FILE**
14 vs.) **FIRST AMENDED COMPLAINT**
15)
16 NATIONSTAR MORTGAGE, DOES 1) Date: March 20, 2014
17 THROUGH 50,) Time: 8:00 a.m.
18) Judge: William Alsup
19 Defendants.) Ctrm.: 8, 19th Floor
20) Complaint Filed: October 9, 2013
21) Trial Date: None
22)
23)
24)
25)
26)
27)
28)

21 Plaintiff ANNA ZBITNOFF (hereinafter "Plaintiff" or "Zbitnoff") respectfully submits this
22 Reply to defendant NATIONSTAR MORTGAGE, LLC's (hereinafter "Nationstar" or "defendant")
23 Opposition to Motion to For Leave to File Amended Complaint (the "Opposition") pursuant to the
24 Court's Order (Docket No. 42).

25 **PRELIMINARY STATEMENT**

26 Plaintiff brought an action to seek relief for a loan created by the lender who "gambled" on the
27 value of Plaintiff's real estate holdings which at the time, in the year 2005, was worth \$632,787 (but
28

1 now currently estimated value¹ at \$564,300) and her liquid assets of \$14,536 which indicated a weak
 2 cash position, for Plaintiff and a loan at the terms presented would not have been in her favor.
 3 Inconsistent and/or missing pages and sections of the Interest Only Addendum cannot be authentic and
 4 representative of terms to which Plaintiff would have agreed. (See Exhibit 2 to Proposed Amended
 5 Complaint, Docket No. 35-1). Furthermore, the beneficial interest in Plaintiff's loan was never
 6 effectively transferred from the original lender to defendant Nationstar. Due to this ineffective transfer,
 7 all documents recorded in the nonjudicial foreclosure process, including the trustee's deed, are "void."
 8 Accordingly, the Court must address Plaintiff's two theories as to why the transfer of the beneficial
 9 interest to defendant Nationstar was not effective: (1) failed securitization, and; (2) defects in the
 10 recorded assignments.

11 Nationstar's opposition to Zbitnoff's request for leave to amend does not provide this Court with
 12 any legally (or factually) sound reason to deny leave to amend the complaint. Nationstar has not – and
 13 cannot – demonstrate the presence of any adverse factors required to oppose leave to amend: undue
 14 delay, bad faith prejudice to the defendant, or futility of the amendment. *See Fed. R. Civ. P. 15(a); see*
 15 *also Foman v. Davis*, 371 U.S. 178, 182 (1962). In this case, Zbitnoff seeks to amend her complaint
 16 with additional facts in support of her various claims in light of the results of discovery that were only
 17 recently obtained.

18 Nevertheless, Nationstar, in its response seeks not only to have this request for leave to amend
 19 denied but dismissal of the action altogether based upon their recently filed Opposition to Plaintiff's
 20 Motion for Leave to File First Amended Complaint (Docket No. 40) and Unilateral Case Management
 21 Statement & [Proposed] Order (Docket No. 41). This defies common sense and the case law. Zbitnoff
 22 should be granted leave to amend her complaint. Logically, therefore, the Court should deny
 23 defendant's opposition.

24 The law has established that leave to amend should be freely given. Fed. R. Civ. P. 15(a)(2).
 25 Leave to amend will be denied only in cases marked by undue delay, bad faith or dilatory motive,
 26 futility of amendment, or undue prejudice to the opposing party. *See, e.g., Foman v. Davis*, 371 U.S.
 27

28 ¹ www.homes.com

1 178, 182 (1962). Indeed, the Court should allow leave to amend “unless there is a substantial
 2 countervailing reason.” *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1110 (11th Cir. 1996) (granting leave
 3 to amend); see also *Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) (“unless there is substantial
 4 reason to deny leave to amend, the discretion of the district courts is not broad enough to permit
 5 denial”). The request made in this case is the first made by Zbitnoff. Objections to leave to amend are
 6 considered on a motion to dismiss/failure to state a claim standard. Zbitnoff has stated valid claims for
 7 fraudulent activities and has provided exhibits that would show missing sections of a contract that
 8 Zbitnoff supposedly signed. Notary seals were also missing from documents that Zbitnoff supposedly
 9 signed.

10 The proposed amended complaint asserts additional facts evidencing Nationstar’s actual
 11 knowledge of a fraudulent scheme and sufficiently stated claims for fraud. Zbitnoff has also stated a
 12 sufficient claim for Intentional Misrepresentation, Negligent Misrepresentation, Invasion Of
 13 Constitutional Right To Privacy and Violation Of Civil Code§ 2923.5 and Wrongful Foreclosure:
 14 Violation Of Civil Code§ 2924 and causing harm to Zbitnoff.

15 **MEMORANDUM OF LAW**

16 **I. The Claims Asserted in the Proposed Amended Complaint Are Supported by the Facts and
 17 Circumstances of the Case, thus Leave to Amend Should Be Granted**

18 Under, Rule 15 of the Federal Rules of Civil Procedure, the court “should freely give leave when
 19 justice so requires.” Fed. R. Civ. P. 15(a)(2); *see also Senger Brothers Nursery, Inc. v. E.I. Dupont De
 20 Nemours & Company*, 184 F.R.D. 674, 678 (M.D. Fla.1999). Therefore, unless it appears beyond doubt
 21 that the Plaintiff cannot state a claim, leave to amend should be granted. *Thomas v. Town of Davie*, 847
 22 F.2d 771, 773 (11th Cir. 1988). “If the underlying facts or circumstances relied upon by a plaintiff may
 23 be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.””
Hargett v. Valley Fed. Sav. Bank, 60 F.3d 754, 761 (11th Cir. 1995) (quoting *Foman v. Davis*, 371 U.S.
 24 178, 182 (1962)). A justifying reason for denying leave to amend must be apparent. *Moore v. Baker*,
 25 989 F.2d 1129, 1131 (11th Cir. 1993). Leave to amend must be granted unless the district court
 26 provides a specific and significant reason for denial, such as undue delay, bad faith or dilatory motive,
 27 repeated failures to cure deficiencies, undue prejudice to the opposing party or futility of amendment.
Spanish Broad. Sys., 376 F.3d at 1077; *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001). None

1 of the examples given in the *Spanish Broad Sys.* opinion justifies the denial of leave to amend in this
 2 case.

3 Zbitnoff's Amended Complaint is currently pending before the Court; accordingly there has been
 4 no abuse of amendments by the Plaintiff. *Spanish Broad. Sys.*, 376 F.3d at 1077. No undue delay will
 5 be caused by the amendment. *Id.* No prior amendment has been sought. Zbitnoff's request for leave was
 6 made in good faith. *Id.* As argued below, the amendment will not be futile. *Id.* Zbitnoff should be given
 7 leave to amend the complaint to further detail the facts evidencing Nationstar's actual knowledge of the
 8 fraudulent scheme as alleged in the complaint in support of the Zbitnoff's claims of fraud
 9 misrepresentation.

10 Moreover, no significant prejudice to Nationstar is likely to result from the Proposed Amended
 11 Complaint. *See Loggerhead Turtle v. Council of Volusia Cty.*, 148 F.3d 1231, 1257 (11th Cir.1998)
 12 (noting that “[a]ny amendment to an original pleading necessarily involves some additional expense to
 13 the opposing party,” but adding that this will not justify denial of leave where the additional expense is
 14 “of nominal proportions”) (emphasis added)).

15 **II. The Proposed Amended Complaint States Plausible Claims for Fraud Against Nationstar,
 16 Therefore, the Amendment Is Not Futile**

17 The only ground for denying amendment here is futility. *Foman v. Davis, supra*, 371 U.S.
 18 at 182. Futility means that the amended complaint would fail to state a claim upon which relief could be
 19 granted. *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1042 (11th Cir.1986). As interpreted by
 20 the Eleventh Circuit, Zbitnoff has plausibly stated claims for fraudulent activities against Nationstar.

21 Courts considering requests for leave to amend have determined that the same standard of legal
 22 sufficiency as applied under a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is
 23 used to determine futility. *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000); *Shane v.*
 24 *Fauver*, 213 F.3d 113, 115 (3d Cir. 2000); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d
 25 1074, 1085 (7th Cir. 1997); *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996).
 26 However, this standard should be applied narrowly. Leave to amend should only be denied on the
 27 ground of futility when the proposed amendment is clearly insufficient or frivolous on its face. *Davis v.*
 28 *Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir.1980).

1 Zbitnoff's claims for fraud, misrepresentation and wrongful disclosure without the additional
 2 facts set forth in the Proposed Second Amended Complaint, have already been determined to be
 3 sufficiently pleaded to state a claim for which relief may be granted. However, Zbitnoff should be given
 4 the opportunity to amend her complaint since the *Lawrence* decision has been raised. The Proposed
 5 Amended Complaint not only meets the *Iqbal* and *Twombly* standard of plausibly pleading ultimate
 6 conclusions of fact, it pleads substantial additional evidence uncovered in discovery that supports those
 7 allegations in accordance with *Lawrence*². Zbitnoff has incorporated additional facts obtained through
 8 discovery that further support her claims for fraudulent and misrepresentation. Therefore, this Court
 9 should reject Nationstar's objection to Zbitnoff's request to amend because it has not shown that the
 10 Proposed Amended Complaint is clearly insufficient or frivolous on its face.

11 **III. Amendment Should Be Permitted.**

12 Plaintiff's Amended Complaint is timely and should be allowed. The Judge's Order dated
 13 December 19, 2013 [Docket 27] allows the Plaintiff "until JANUARY 23, 2014, AT NOON, to file a
 14 motion" for leave to file an amended complaint. This motion is being filed prior to that deadline.
 15 Furthermore, Plaintiff is within the liberal standard for freely allowing the amendment of pleadings. See
 16 *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of . . . undue delay, bad faith or dilatory
 17 motive on the part of the movant . . . undue prejudice to the opposing party by virtue of allowance of the
 18 amendment . . . the leave sought should, as the rules require, be 'freely given.'")

19 There is no prejudice to defendants and defendants have not raised any objections. Additionally,
 20 Plaintiff's Amended Complaint does not change the nature of the lawsuit, nor are defendants precluded
 21 from seeking discovery in relation to the Amended Complaint. All parties have yet to seek discovery.
 22 Accordingly, defendants will not be prejudiced by an order granting leave to file Plaintiff's Amended
 23 Complaint.

24 Moreover, Plaintiff offers her Amended Complaint in good faith and without undue delay. Since
 25 filing her original complaint, Plaintiff has discovered new information regarding defendants' business
 26 practices and discrepancies in the closing documents. This information supports Plaintiff's new claims

28 ² Zbitnoff need not detail how the allegations in the Proposed Amended Complaint more than meet the *Twombly* and *Iqbal*
 standard as interpreted by the *Lawrence* Court; the First Amended Complaint speaks for itself.

1 under the relevant case laws regarding her mortgage. See *Coilcraft, Inc. v. Inductor Warehouse*, 2000
 2 U.S. Dist. LEXIS 6097, *8-9 (no bad faith where plaintiff made “reasonable inquiry” into facts
 3 supporting new claim, introduced relevant evidence, and “has never mischaracterized the nature of the
 4 lawsuit”).

5 In sum, Plaintiff’s Amended Complaint was filed timely and in good faith, contains claims
 6 similar to those originally asserted and does not prejudice defendants. Consequently, none of the factors
 7 on which courts base denial of motions for leave to amend are present here. Thus, Plaintiff’s motion for
 8 leave should be granted.

9 **IV. The First Amended Complaint Will Not Delay Trial.**

10 Courts apply a policy of great liberality in permitting amendments to the complaint at any stage
 11 of the proceedings up to and including trial. See *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d
 12 290, 296-97; see also *Sachs, Inc.*, 151 Cal.App.3d at 484-85 (finding amendment proper four years after
 13 filing of original complaint and on the eve of trial where delay due to Defendants’ untimely discovery
 14 responses).

15 In the present case, Plaintiff has spent a large amount of time attempting to receive basic
 16 information from Defendants. Such basic information changes the scope of the Plaintiff’s claims.

17 **V. The First Amended Complaint Will Not Necessitate Added Preparation Costs**

18 In the present case, no trial date has been set, and the parties are still in the early stages of
 19 discovery. Therefore, the First Amended Complaint will not necessitate any added preparation costs for
 20 defendants.

21 **CONCLUSION**

22 Nationstar will not suffer any prejudice by the Court granting the Zbitnoff’s Motion to Amend.
 23 Moreover, discovery in this case has yet to commence and the trial in this matter has not been set.
 24 Finally, this is Zbitnoff’s first request for leave to amend and the amendment is not futile. Based on the
 25 foregoing reasons, and in the interest of justice, Zbitnoff should be granted leave to amend.

26 WHEREFORE, Zbitnoff respectfully requests that this Court grant Motion to For Leave to File
 27 Amended Complaint to assert the claims and facts as currently known to Zbitnoff.

1
2 Dated: March 14, 2014
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respectfully submitted,

/s/ Anna Zbitnoff

Anna Zbitnoff

Plaintiff in Pro Se

PROOF OF SERVICE

United States District Court, Northern District Of California
3:13-cv-05221-WHA - *Zbitnoff v. Nationstar Mortgage, et al.*

I am a resident of the State of California, over the age of eighteen years.

On March 14, 2014, I served the

**PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO
FILE FIRST AMENDED COMPLAINT**

by electronic notice through the Court's website to the following parties currently on the list to receive e-mail notices for this case:

Christian Crutchfield Chapman
cchapman@amslca.com, ahernandez@amslca.com

Starlet Joy Japp
starlet.japp@kutakrock

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on March 14, 2014, at Redwood Valley, California.

/s/ Anna Zbitnoff

Anna Zbitnoff